

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation into the
Functioning of the Wholesale Electric Market and
Associated Impact on Retail Rates.

Investigation 00-08-002
(Filed August 3, 2000)

**ADMINISTRATIVE LAW JUDGE'S RULING
PROPOSING FURTHER MODIFICATIONS TO PROTECTIVE ORDER**

1. Summary

Comments may be filed on proposed modifications to the Protective Order that was adopted by the September 22, 2000 Administrative Law Judge's (ALJ) ruling and modified by rulings dated November 2, 2000, and April 22, 2002.

2. Discussion

A draft decision that would close this proceeding was issued for comment on May 27, 2004. No comments were received, and the draft decision was placed on the Commission's agenda for consideration at its meeting of July 8, 2004. The item was then held at the request of the Commission staff.

Commission staff has informed me that the Protective Order adopted in this proceeding has been used by electric wholesale generators in both this proceeding and in the general, ongoing "Investigation Pertaining To The Reliability Of Energy Generation, Marketing And Delivery," described in Commission Resolution L-293. Staff reports that a great deal of information has been provided to the Commission under the confidentiality provisions of the Protective Order. Moreover, staff reports, certain electric wholesale generators continue to claim confidentiality under the Protective Order for materials

provided to the Commission, even though such materials are not related to this proceeding.¹

The Protective Order provides that “Protected Materials shall remain available to Reviewing Representatives until the later of the date that an order terminating this proceeding becomes no longer subject to judicial review, or the date that any other CPUC or Federal Energy Regulatory Commission (“FERC”) proceeding relating to the Protected Materials is concluded and no longer subject to judicial review.” (Protective Order, Paragraph 5.) In view of the Commission’s ongoing responsibilities to implement and enforce Public Utilities Code Section 761.3, as well as its ongoing general responsibility regarding the safety and reliability of electrical service in California as related to these Protected Materials, it appears that the Protective Order should be modified in certain respects before this proceeding is closed, as follows:

- Materials provided to the Commission under claims of confidentiality based on the Protective Order may remain available to reviewing representatives after the later of the date that an order terminating this proceeding becomes no longer subject to judicial review, or the date that any other CPUC or FERC proceeding relating to the Protected Materials is concluded and no longer subject to judicial review. Protected materials will now remain available to reviewing representatives until Commission’s Executive Director determines (a) that the general, ongoing “Investigation Pertaining To The Reliability Of Energy Generation, Marketing And Delivery,” described in Resolution L-293, is concluded, or (b) that the protected materials subject to the protective order no longer need to remain available to reviewing representatives.

¹ This broader use of the Protective Order was permitted by Resolution L-293.

- No new claims of confidentiality under the Protective Order will be permitted after the later of the date of an order terminating this proceeding or the date of an order terminating the confidentiality provisions of Resolution L-293.

For those materials already submitted to the Commission, the confidentiality provisions of the Protective Order will remain in force until further order of this Commission.

The terms of the Protective Order state that it “shall remain in effect until, after notice and an opportunity to be heard, it is specifically modified or terminated.” (Protective Order, Paragraph 1.) The assigned ALJ, the Law and Motion ALJ, or the Assigned Commissioner may, after notice and opportunity to be heard, alter or amend the Protective Order as circumstances warrant at any time during the course of this proceeding. (Protective Order, Paragraph 14.) This ruling shall provide such notice and opportunity to be heard with respect to the modifications proposed herein. A copy of the protective order incorporating the proposed modifications is attached to this ruling.²

IT IS RULED that:

Comments may be filed on proposed modifications to the Protective Order that was adopted by the September 22, 2000 Administrative Law Judge’s (ALJ) ruling and modified by rulings dated November 2, 2000, and April 22, 2002, as

² Substantive modifications appear in Paragraphs 1 and 5 of the Protective Order.

set forth in the attachment hereto. Comments are due ten days from the date of this ruling. Replies are not to be filed unless permitted by further ruling.

Dated July 27, 2004, at San Francisco, California.

/s/ MARK S. WETZELL

Mark S. Wetzell
Administrative Law Judge

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(PROPOSED MODIFICATIONS)

**PROTECTIVE ORDER CONCERNING
RESPONSES TO CPUC SUBPOENAS
(THIRD MODIFIED VERSION, , 2004)**

1. This Protective Order shall govern the use of all Protected Materials produced by, or on behalf of, any respondent ("Respondent") to a subpoena issued in this proceeding by the California Public Utilities Commission ("CPUC") that directs the Respondent to produce witnesses, documents, or other items to CPUC Staff or to follow-up data requests. Notwithstanding any order terminating this proceeding, this Protective Order shall remain in effect until, after notice and an opportunity to be heard, it is specifically modified or terminated by the Assigned Commissioner, Assigned Administrative Law Judge ("Assigned ALJ"), the Law and Motion Administrative Law Judge, ("Law & Motion ALJ") or the full CPUC. No new claims of confidentiality under the Protective Order will be permitted after the later of the date of an order terminating this proceeding or the date of an order terminating the confidentiality provisions of Resolution L-293.

2. A Respondent or its authorized representative may designate as protected those materials which customarily are treated by that Respondent as sensitive or proprietary, which are not available to the public, and which, if

disclosed freely, would subject that Respondent, its affiliates, its customers or its investors to risk of competitive disadvantage or other business injury.

3. Definitions – For purposes of this Order:

(a) The term “Respondent” shall mean an entity or person or authorized representative responding to a subpoena issued by the CPUC directing the production of witnesses, documents, or other items to CPUC staff.

(b) (1) The term “Protected Materials” means (A) materials (including depositions) provided by a Respondent in response to subpoenas and/or discovery requests and designated by such Respondent as protected; (B) any information contained in or obtained from such designated materials; (C) any other materials which are made subject to this Protective Order by the Assigned ALJ, by the Law and Motion ALJ, by the Assigned Commissioner, by the CPUC, or by any court or other body having appropriate authority; (D) Notes of Protected Materials; and (E) copies of Protected Materials. The Respondent producing the Protected Materials shall physically mark them on each page either (1) with the words “PROTECTED MATERIALS” or words of similar import as long as the term “Protected Materials” is included in that designation to indicate that they are Protected Materials; or (2) with the words, in bold typeface, “Contains Privileged Information—Do Not Release.”

(2) The term “Notes of Protected Materials” means memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses materials described in Paragraph 3(b)(1). Notes of Protected Materials are subject to the same restrictions provided in this order for Protected Materials except as specifically provided in this order.

(3) Protected Materials shall not include (A) any information or document already contained in the public files of the CPUC or any other federal

or state agency, or any federal or state court, unless the information or document has been determined to be protected by such agency or court, or (B) information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order.

(c) The term "Non-Disclosure Certificate" shall mean the certificate annexed hereto by which persons who have been granted access to Protected Materials shall certify their understanding that such access to Protected Materials is provided pursuant to the terms and restrictions of this Protective Order, and that such persons have read the Protective Order and agree to be bound by it.

(d) The term "Reviewing Representative" shall mean a person identified in Paragraph 6 or a person who has signed a Non-Disclosure Certificate and who is:

- (1) CPUC Staff;
- (2) an attorney, paralegal, or other employee associated for purposes of this case with CPUC Staff;
- (3) an expert or an employee of an expert retained by CPUC Staff for the purpose of advising, preparing for or testifying in this proceeding; or
- (4) a person designated as a Reviewing Representative, after notice and an opportunity to be heard, by order of the Assigned ALJ, the Law and Motion ALJ, the Assigned Commissioner, or the CPUC.

4. Protected Materials shall be made available under the terms of this Protective Order only to Reviewing Representatives.

5. Protected Materials shall remain available to Reviewing Representatives until the later of the date that an order terminating this proceeding becomes no longer subject to judicial review; ~~or~~ the date that any other CPUC or Federal Energy Regulatory Commission ("FERC") proceeding relating to the Protected

Materials is concluded and no longer subject to judicial review; or the date that the Commission's Executive Director determines (a) that the general, ongoing "Investigation Pertaining To The Reliability Of Energy Generation, Marketing And Delivery," described in Resolution L-293, is concluded, or (b) that the protected materials subject to the protective order no longer need to remain available to reviewing representatives. If requested to do so in writing after that date, the CPUC Staff shall, within fifteen (15) days of such request, return the Protected Materials (excluding Notes of Protected Materials) to the Respondent that produced them, or shall destroy the materials, except that copies of filings, official transcripts and exhibits in this or related proceedings that contain Protected Materials, and Notes of Protected Material may be retained, if they are maintained in accordance with Paragraph 6, below. Within such time period CPUC Staff, if requested to do so, shall also submit to the producing Respondent an affidavit stating that, to the best of their knowledge, all Protected Materials and all Notes of Protected Materials have been returned or have been destroyed or will be maintained in accordance with Paragraph 6. To the extent Protected Materials are not returned or destroyed, they shall remain subject to the Protective Order.

6. All Protected Materials shall be maintained by Reviewing Representatives in a secure place. Access to those materials shall be limited to those Reviewing Representatives specifically authorized pursuant to this paragraph or Paragraphs 3, 8, and 9. Protected Materials may be made available or disclosed to the FERC and FERC Staff pursuant to the procedures of 18 CFR § 388.112 and to the CPUC Commissioners and their personal advisors; the Assigned ALJ or the Law and Motion ALJ; the Governor of the State of California and his staff; the Attorney General of the State of California and his staff; the

Attorney General's retained experts, including employees of retained experts, but excluding any experts or employees of experts who are retained by plaintiffs or who are otherwise assisting or involved on behalf of plaintiffs in the Wholesale Electricity Antitrust Cases I and II, Judicial Council Coordination Proceeding Nos. 4202-00005 and 4204-00006; other state agencies and their staffs; and other representatives or officials of the State of California and their staffs, provided that such persons keep the Protected Materials confidential. To the extent that any member of the staffs of the CPUC Commissioners, of the Governor of the State of California, of the Attorney General of the State of California, of other state agencies, or of other representatives or officials of the State of California, or any retained expert or consultant of the CPUC or the Attorney General of the State of California, including any employee of such retained expert or consultant, receives copies of Protected Materials produced by Respondents, each such person shall sign a Non-Disclosure Certificate unless that person is exempt from the requirement to sign a Non-Disclosure Certificate pursuant to Paragraph 9(a). The Commission will maintain on its website and periodically update a listing of all persons who have signed Non-Disclosure Certificates in accordance with this Protective Order. Any Protected Materials filed with the CPUC or with other Reviewing Representatives shall be kept in a non-public file. By placing such documents in a non-public file, the CPUC is not making a determination of any claim of privilege. The CPUC retains the right to make determinations regarding any claim of privilege and the discretion to release information necessary to carry out its jurisdictional responsibilities.

For Protected Materials submitted to CPUC Staff, if a Public Records Act¹ (“PRA”) requester seeks Protected Materials, the CPUC will notify the Respondent who submitted the Protected Materials and give Respondent an opportunity (at least five business days) in which to comment in writing on the request. A copy of this notice will be sent to the PRA requester. The CPUC will review the request as per General Order No. 66(c)(3.3) and make a determination as to which, if any, of the Protected Materials responsive to the PRA request are “public records which fall within the exclusions listed in Section 2 [of General Order No. 66(c)], or if there is some public interest served by withholding the records.” General Order No. 66(c)(3.3). See also General Order No. 66(c)(2.2).² A Respondent whose comments have objected to a PRA request to release materials for which Protected Materials status is asserted shall receive notice prior to the release of any such materials, and those materials shall, nevertheless, be subject to the protection afforded by this Protective Order for seven (7) business days from the date of the determination that they are subject to disclosure. If the producing Respondent subsequently files an interlocutory appeal or requests that the issue be certified to the full Commission, then the materials shall be subject to the protection afforded by this Protective Order until the CPUC acts upon the request, and, if disclosure is authorized, for an additional seven (7) business days thereafter. When a PRA requester appeals a denial of a PRA request to the full Commission pursuant to General Order No. 66(c)(3.4), or brings suit to compel

¹ Government Code section 6250 *et seq.*

² “Public records not open to inspection include: (2.2) Records or information of a confidential nature furnished to or obtained by the Commission. [citations omitted]”

disclosure of Protected Materials, the CPUC will notify the person who submitted Protected Material of the appeal or the suit.

7. Protected Materials shall be treated as confidential by the Reviewing Representative. Protected Materials shall not be used except as necessary for the conduct of this proceeding, related proceedings before the Commission or other agencies of the State of California, or related proceedings in which the State of California or agencies of the State of California are parties, nor shall they be disclosed in any manner to any person except a Reviewing Representative. Reviewing Representatives may make copies of Protected Materials, but such copies become Protected Materials. Reviewing Representatives may make notes of Protected Materials, which shall be treated as Notes of Protected Materials if they disclose the contents of Protected Materials.

8. (a) If a Reviewing Representative's scope of employment includes the marketing of energy, the direct supervision of any employee or employees whose duties include the marketing of energy or the bidding on or purchasing of power generating plants, the provision of consulting on such matters, or the direct supervision of any employee or employees whose duties include such matters or consulting, such Reviewing Representative may not use information contained in any Protected Materials obtained through this proceeding to give any person or company or any competitor of any Respondent a commercial advantage.

(b) In the event that CPUC Staff wishes to designate as a Reviewing Representative a person not described in Paragraph 3(d) or Paragraph 6 above, the CPUC Staff shall seek agreement from the Respondent providing the Protected Materials. If an agreement is reached, that person may serve as a Reviewing Representative pursuant to Paragraph 3(d) above with respect to those materials. If no agreement is reached, the CPUC Staff shall submit the

disputed designation to the Assigned ALJ, the Law and Motion ALJ, or the Assigned Commissioner, for resolution.

9. (a) A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Protected Materials pursuant to this Protective Order unless that Reviewing Representative is identified in Paragraph 6 or has first executed a Non-Disclosure Certificate, provided that if a Reviewing Representative has executed such a certificate, the paralegal, secretarial and clerical personnel under that Reviewing Representative's instruction, supervision or control need not execute individual Non-Disclosure Certificates.

(b) Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this order.

10. Any Reviewing Representative may disclose Protected Materials to any other Reviewing Representative as long as the disclosing Reviewing Representative and the receiving Reviewing Representative both have executed a Non-Disclosure Certificate or are otherwise identified in Paragraph 6. In the event that any Reviewing Representative to whom the Protected Materials are disclosed ceases to be engaged in these proceedings, or is employed or retained for a position whose occupant is not qualified to be a Reviewing Representative under Paragraphs 3(d), access to Protected Materials by that person shall be terminated. Even if no longer engaged in this proceeding, every Reviewing Representative shall continue to be bound by the provisions of this Protective Order.

11. Subject to Paragraph 17, the Assigned ALJ, the Law and Motion ALJ, or the Assigned Commissioner shall resolve any disputes arising under this Protective Order. Prior to presenting any dispute under this Protective Order to

the Assigned ALJ, the Law and Motion ALJ, or the Assigned Commissioner, the parties to the dispute shall meet and confer and use their best efforts to resolve it. Any person that contests the designation of materials as protected shall notify the party that provided the Protected Materials by specifying in writing the materials whose designation is contested. This Protective Order shall automatically cease to apply to such materials seven (7) business days after the notification is made unless the designator, within said 7-day period, files a motion with the Assigned ALJ, the Law and Motion ALJ, or the Assigned Commissioner, with supporting declarations or affidavits, demonstrating that the materials should continue to be protected. In any challenge to the designation of materials as protected, the burden of proof shall be on the Respondent seeking protection. If the Assigned ALJ, the Law and Motion ALJ, or the Assigned Commissioner, finds that the materials at issue are not entitled to protection, the procedures of Paragraph 17 shall apply.

12. All copies of all documents reflecting Protected Materials, including the portion of the hearing testimony, exhibits, transcripts, briefs and other documents which refer to or are derived from Protected Materials, shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked “**PROTECTED MATERIALS**” and shall be filed under seal and served under seal only upon the Assigned ALJ, the Assigned Commissioner, and all Reviewing Representatives who are on the service list. For anything filed under seal, redacted versions or, where an entire document is protected, a letter indicating such will also be filed with the CPUC and served on all parties on the service list and the Assigned ALJ and the Assigned Commissioner. Counsel for the CPUC Staff shall provide to all parties and Respondents who request the

same, a list of Reviewing Representatives who are entitled to receive such material. Counsel shall take all reasonable precautions necessary to assure that Protected Materials are not distributed to unauthorized persons.

If any Reviewing Representative desires to include, utilize, or refer to any Protected Materials in such a manner that might require disclosure of such material, such Reviewing Representative shall first notify counsel for the producing Respondent, the Assigned ALJ, and the Assigned Commissioner, of such desire, identifying with particularity each of the Protected Materials and the proposed manner of their use, and shall provide to counsel for the producing Respondent and the Assigned ALJ, and the Assigned Commissioner, in a sealed envelope bearing the caption “**PROTECTED MATERIALS**” copies of the Protected Materials in the form they are intended to be used. If the producing Respondent is unwilling to waive objection to disclosure of such Protected Materials, the producing Respondent shall provide to the Assigned ALJ and the Assigned Commissioner, not later than seven (7) business days after the receipt of the Reviewing Party's notification, declarations or affidavits³ with respect to each of the identified Protected Materials. The declarations or affidavits shall set forth facts delineating that the information designated as Protected Materials has been maintained in a confidential manner and the precise nature and justification for the non-disclosure of such information. The producing Respondent shall provide copies of the declarations or affidavits to each Reviewing Party

³ The declarations or affidavits shall comply with *International Paper Company v. Fibreboard Corp.*, 63 FRD 88, 93-94 (1974) and *Parsons v. General Motors Corp.*, 85 FRD 724, 726 (N.D. Ga. 1980), and, if claims of work product immediately are concerned, with *Cajun Electric Power Coop., Inc. v. Gulf States Utilities Co.*, 43 FERC ¶ 63,012, 65,129 (1988).

providing such notification. All objections and arguments related to the Protected Materials shall be conducted *in camera* closed to all parties except the producing Respondent and counsel for the producing Respondent and such Reviewing Representatives and counsel for Reviewing Representatives that are authorized to review such Protected Materials. That portion of the hearing transcript which refers to such Protected Materials shall be sealed and be subject to this Protective Order. All Protected Materials which may ultimately be admitted into evidence shall be filed in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order.

13. Nothing in this Protective Order shall be construed as precluding any Respondent from objecting to the use of Protected Materials on any legal grounds.

14. Nothing in this Protective Order shall preclude any Participant from requesting the Assigned ALJ, the Law and Motion ALJ, the Assigned Commissioner, the CPUC, or any other body having appropriate authority, to find that this Protective Order should not apply to all or any materials previously designated as Protected Materials pursuant to this Protective Order. The Assigned ALJ, the Law and Motion ALJ, or the Assigned Commissioner, may, after notice and opportunity to be heard, alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding. Delays in the compliance with the subpoenas shall not be justified on the basis that there is a pending request to alter or amend this Protective Order or that there is a dispute arising under this Protective Order.

15. Each Respondent, Reviewing Representative or party governed by this Protective Order has the right to seek changes in it as appropriate from the

Assigned ALJ, the Law and Motion ALJ, the Assigned Commissioner, or the CPUC.

16. All Protected Materials filed with the CPUC, the Assigned ALJ, or the Assigned Commissioner, or any other judicial or administrative body, in support of, or as a part of, a motion, other pleading, brief, or other document, shall be filed and served in sealed envelopes or other appropriate containers bearing prominent markings indicating that the contents include Protected Materials subject to this Protective Order.

17. If the Assigned ALJ, the Law and Motion ALJ, or the Assigned Commissioner, at any time in the course of this proceeding finds, *sua sponte*, that all or part of the Protected Materials are not confidential, those materials shall, nevertheless, be subject to the protection afforded by this Protective Order for five (5) business days from the date of issuance of the decision of the Assigned ALJ, the Law and Motion ALJ, or the Assigned Commissioner. If the producing Respondent files an interlocutory appeal or requests that the full CPUC review the decision, the materials shall be subject to the protection afforded by this Protective Order until the CPUC acts upon the request, and, if disclosure is required, for an additional seven (7) business days thereafter. None of the Respondents waives its rights to seek additional administrative or judicial remedies after the Assigned ALJ, the Law and Motion ALJ, or the Assigned Commissioner's decision respecting Protected Materials or Reviewing Representatives, or the CPUC's denial of any appeal thereof. The provisions of Paragraph 6 shall apply to any requests for Protected Materials in the files of the Commission under the Public Records Act.

18. Nothing in this Protective Order shall be deemed to preclude any Participant from independently seeking through discovery in any other

administrative or judicial proceeding information or materials produced in this proceeding under this Protective Order.

19. None of the Respondents waives the right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Protected Materials.

20. The contents of Protected Materials or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with this Protective Order and shall be used only in connection with this proceeding or related proceedings. Any violation of this Protective Order and of any Non-Disclosure Certificate executed hereunder shall constitute a violation of an order of the CPUC.

Dated _____, 2004, at San Francisco, California.

/

Mark Wetzell
Administrative Law Judge

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation into the
Functioning of the Wholesale Electric
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Investigation 00-08-002
(Filed August 3, 2000)

NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to Protected Materials is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I understand that the contents of the Protected Materials, any notes or other memoranda, or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with that Protective Order. I acknowledge that a violation of this certificate constitutes a violation of an order of the California Public Utilities Commission.

By:_____

Title:_____

Representing:_____

Date:_____

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Proposing Further Modifications to Protective Order on all parties of record in this proceeding or their attorneys of record.

Dated July 27, 2004, at San Francisco, California.

/s/ KE HUANG

Ke Huang

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.